STATE OF MICHIGAN

IN THE SUPREME COURT

APPEAL FROM THE MICHIGAN COURT OF APPEALS
Hon. Helene N. White, Presiding Judge

PHYLLIS L. GRIFFITH, Legal Guardian for DOUGLAS W. GRIFFITH, a Legally Incapacitated Adult,

Plaintiff-Appellee,

v. **Supreme Court No. 122286**

STATE FARM MUTUAL AUTOMOBILE INSURANCE COMPANY,

Defendant-Appellant.

Court of Appeals No. 232517
Ingham County Circuit Court No. 97-087437-NF

REPLY BRIEF OF DEFENDANT-APPELLANT, STATE FARM MUTUAL AUTOMOBILE INSURANCE COMPANY

PROOF OF SERVICE

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INTRODUCTION

In its principal Brief on Appeal, Defendant STATE FARM addresses the rationale of the *Reed* "room and board rule" and shows that it lacks a statutory foundation. As basic necessities of all human life, food and shelter are of course "reasonably necessary" for the well-being of any person injured in a motor vehicle accident. Yet it does not follow that the cost of these basic necessities must constitute "allowable expenses" under §3107(1)(a) of the no-fault act. MCL 500.3107(1)(a).

Rather, under §3105(1) of the act, an insurer is only liable for benefits that are "for accidental bodily injury arising out of the ... use of a motor vehicle..." MCL 500.3105(1). Where expenses incurred for these basic needs are entirely unrelated to the fact that there was an automobile accident, any benefits paid as reimbursement would, in effect, be welfare benefits, not "benefits for accidental bodily injury" under §3105(1), and therefore not "allowable expenses" under §3107(1)(a).

The challenge Plaintiff faces in this appeal is to articulate the precise elements of a "room and board" benefits claim, and to provide principled, statute-based reasons for those elements. Plaintiff's Brief on Appeal fails to do so. Instead, Plaintiff simply begins with the proposition that severely injured claimants need and therefore are entitled to the "accommodations" of room and board (Plaintiff-Appellee's Brief, pp. 3-7); then, erecting two entirely inapt legal arguments and attributing them to Defendant (*id.*, pp. 7-14, 14-20), Plaintiff proceeds to knock these straw men down and accuses Defendant of courting "judicial activism" in purportedly advancing them.

Defendant here addresses these arguments advanced by Plaintiff, and illustrates the logical flaw inherent in the "room and board" rule announced in *Reed v Citizens Ins Co*, 198

Mich App 443; 499 NW2d 22 (1993), *lv den*, 444 Mich 964 (1994), and advocated by Plaintiff. Once the medical and related components of Douglas Griffith's needs, which are causally related to his accident, are conceptually segregated from his basic costs of living, which are not related to his accident, proper assessment of the no-fault insurer's responsibility becomes clear.

ARGUMENT

A. There is no merit to Plaintiff's claim that strict construction of the term "accommodations" in §3107(1)(a) requires payment of "room and board" benefits to an accident victim in his own home.

As her primary argument before this Court, Plaintiff-Appellee shows that "food and lodging" is among the commonly understood meanings for the term "accommodations." Thus, Plaintiff, argues, where §3107(1)(a) entitles the injured party to recover as benefits all reasonable charges "for reasonably necessary products, services and accommodations," it means he is entitled to recover his room and board expenses.

Plaintiff's argument selectively ignores other elements within the statute. Not all charges incurred by an injured party for "products, services and accommodations" qualify as benefits, since the statute goes on to say that the products, services and accommodations must be "for an injured person's care, recovery or rehabilitation." §3107(1)(a). When "food and lodging" expenses are necessarily incurred as a condition for the delivery of inpatient medical or rehabilitative care, then it can be accurately stated that the accommodations are "for [the] injured person's care, recovery or rehabilitation."

By definition, a patient cannot receive inpatient care without occupying a bed and room in the hospital and incurring charges for food service, gowns, bedding, toiletries, and the like. By contrast, when even a severely disabled accident victim living at home incurs the ordinary

expenses of food, shelter, clothing, toiletries and the like, there is no connection between such so-called "accommodations" and the "care, recovery or rehabilitation" of his accident-injuries. As has been detailed in Defendant's principal brief, §3105(1) provides that an insurer is liable only "to pay benefits for accidental bodily injury arising out of the ... use of a motor vehicle as a motor vehicle[.]"

Furthermore, construing the "allowable expense" provision of §3107(1)(a) by simply asking whether the particular "product, service or accommodation" is "reasonably necessary" for the person's care, without requiring a direct causal link to the person's accident-injuries, tortures the intent of the statute. Consider a person whose only injury suffered in an accident is a sprained thumb. This "injured person" certainly has a reasonable need for food and shelter, as does every living person. Is he, therefore, entitled to no-fault reimbursement, since these "accommodations" are reasonably necessary? Clearly not, because such "accommodations" are not for the care, recovery or rehabilitation of this person's injury.

Nor would this sprained-thumb victim be entitled to no-fault reimbursement for the seemingly reasonable expense of, say, a doctor visit for treatment of an unrelated sore-throat. Certainly such treatment is "reasonably necessary" for this injured person's "care, recovery or rehabilitation." So why would this not be an "allowable expense" under §3107(1)(a)? Because it is not "for the care, recovery or rehabilitation" of his accidental bodily injury arising out of the use of the motor vehicle. §3105(1).

Thus, while it cannot be disputed that Doug Griffith's "accommodations" of food and shelter are "reasonably necessary" for his continued sustenance, it cannot be said that such expenses are incurred "for the care, recovery or rehabilitation" of his accidental bodily injuries

any more than the sprained-thumb victim could say that his food and shelter expenses are incurred "for the care, recovery or rehabilitation" of his accidental bodily injury. In neither case is the no-fault insurer liable to pay such benefits, since they would not be "for accidental bodily injury arising out of the ... use of a motor vehicle[.]"

B. Contrary to the assertions underlying Arguments II and III of Plaintiff-Appellee's Brief, Defendant's position does not advocate either a "'*personal consumption*' exclusion" or a "*situs*" test in this case.

Plaintiff's second argument is a classic example of attempting to cram a square peg into a round hole. There happens to be a claimant-favorable rule applicable to the calculation of no-fault survivors' loss benefits under MCL 500.3108(1), which provides that the cost savings from the amounts a decedent no longer will expend on his or her own "personal consumption" (e.g., food, clothing) may not be subtracted from his or her economic "contributions" when determining the survivors' loss benefit payable to the decedent's family. *Miller v State Farm Mut Ins Co*, 410 Mich 538; 302 NW2d 537 (1981). Without ever showing precisely how this benefit reduction theory might apply to the "room and board" issue presented, Plaintiff nevertheless characterizes Defendant's position as seeking to introduce a "'*personal consumption*' exclusion" in this case; then proceeds to argue, at length, in defense of the holding in *Miller* rejecting use of a "personal consumption factor" to reduce benefits (Plaintiff-Appellee's Brief, pp. 7-14).

The Court should find no merit in Plaintiff's attempt to mischaracterize Defendant's position. However compelling the argument might be for a "personal consumption factor" to

be utilized in calculating monthly benefits under §3108(1),[1] no such issue is raised by the facts of this case. At issue here is whether Plaintiff is affirmatively entitled to a claimed class of benefits in the first instance, not whether any set-offs or reductions may be applied to benefits to which Plaintiff already is entitled.

Thus, Plaintiff's attempt to equate the test articulated by the Court of Appeals in *Manley*[2] (and advocated here by Defendant) with the "consumption factor" rejected by the Supreme Court in *Miller*, *supra*, is wholly without merit. The two concepts simply are not analogous. Further, in addressing the Court of Appeals' test, Plaintiff is materially inaccurate in stating that the Supreme Court in *Manley* "forcefully repealed" the rule articulated by the intermediate court (Plaintiff-Appellee's Brief, p. 13). Contrary to Plaintiff's assertion (*id.*, p. 12), there was no "majority[] holding" in this Court's *Manley* opinion with regard to the merits of the room and board issue, and merely declining review and vacating the precedential effect of the Court of Appeals' decision, on grounds that the issue was not preserved, hardly constitutes a "forceful repeal" of the test. *Manley v DAIIE*, 425 Mich at 152-153.

Nor is Plaintiff accurate in her third argument, which asserts that Defendant is advocating a "*situs*" test for determining "when food is compensable as an '*allowable expense*'

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[1] It is questionable, given the methods of statutory construction that were employed in *Miller v State Farm Mut Ins Co*, *supra*, whether the same result would be reached today under an analysis seeking to discern Legislative intent more directly from the language of the statute. Indeed, the opinion in *Miller* acknowledges forthrightly that, by application of "the bare language of the statute," a personal consumption factor seemingly should apply since, according to the actual text, the amount of benefits payable to a decedent's survivors is supposed to be a function of how much they would have received from the decedent *but for* his death. *See*, *Miller*, 410 Mich at 565-567.

[2] *Manley v DAIIE*, 127 Mich App 444, 454; 339 NW2d 205 (1983), *rev'd in part*, 425 Mich 140 (1986) ("accommodations which are as necessary for an uninjured person as for an injured person are not 'allowable expenses'"). *See*, Defendant-Appellant's Brief, pp. 14, 17.

under §3107(1)(a)" (Plaintiff-Appellee's Brief, p. 18). Plaintiff points to opinions such as this Court's assault and car-jacking cases -- *Thornton v Allstate Ins Co*, 425 Mich 625; 391 NW2d 312 (1986); *Bourne v Farmers Ins Exchange*, 449 Mich 193; 534 NW2d 491 (1995); *Morosini v Citizens Ins Co*, 461 Mich 303; 602 NW2d 828 (1999) -- to insist that "the mere '*situs*' of the insured" is not a sufficient basis for establishing a causal nexus in a no-fault claim (Plaintiff-Appellee's Brief, p. 18). Again, Plaintiff grossly mischaracterizes Defendant's position. (*Id.*, p. 15 -- "Appellant's desired concept [is] that '*situs*' establishes a sufficient causal nexus").

As this Court well knows, the issue surrounding the "*situs* of the insured" (i.e., whether an injury is compensable merely on the basis that it was sustained in a motor vehicle) concerns the "arising out of the use of a motor vehicle as a motor vehicle" inquiry. §3105(1). Here, Plaintiff Griffith's injury did arise out of the use of a motor vehicle as a motor vehicle, there is no dispute. It is an entirely separate question, however, whether the benefits claimed in this case -- reimbursement for the basic necessities of living -- qualify as "benefits *for [the] accidental bodily injury*." §3105(1) (emphasis added). Clearly the answer is "no," because they are not "accommodations" for the "care, recovery, or rehabilitation" of Plaintiff's accident-injuries. §3107(1)(a).

The criterion on which the room and board issue in this case turns, Defendant submits, is *not* the claimant's physical location at the time he or she incurs expense. Rather, the requisite causal nexus exists between a claimant's "room and board" expenses and his accident-injuries when the provision of necessary medical care is dependent upon the claimant remaining as an inpatient of the medical care facility -- i.e., when his injuries require "inpatient" care. Under those circumstances, the expense of the patient's room and institutional meal services is

necessarily incurred in conjunction with his receipt of that medical care. Absent the connection between such expenses and the treatment of accident-injuries, there is no principled, statutory basis for finding them compensable.

C. Plaintiff's test, "otherwise institutionalized = food expense is allowable," is logically flawed and unrelated to the text of the statute.

The rule emanating from *Reed v Citizens Ins Co*, and advocated by Plaintiff in this case, is this: if an injured person *would* be institutionalized "but for" the family's "willingness" to provide the extensive home-based care that is needed, then ("and only then" -- CPAN Amicus Curiae Brief, p. 9) is the cost of food an allowable expense. In short, "otherwise institutionalized = food expense is allowable." (Plaintiff-Appellee's Brief, pp. 20-21; CPAN Amicus Curiae Brief, pp. 3, 9, 10).

Defendant has shown, however, that this equation is logically flawed and lacks any basis in the statutory language, because it requires no connection between the claimed benefits and the accident-injuries apart from the wage-earning disability with which the accident has left the victim. Plaintiff's position, in other words, seeks to transform §3107(1)(a), which compensates for the expense of medical and related treatment, into a substitute for §3107(1)(b), which provides wage replacement benefits but which expires three years after the accident. (*See*, Defendant-Appellant's Brief, pp. 25-26). Simply put, the Legislature did not intend the no-fault insurance scheme -- which is to say, the motoring public -- to provide life-long welfare benefits to permanently disabled automobile accident victims.

In its Amicus Curiae Brief, CPAN accurately points out the realities of cost-containment within the healthcare community:

> In order to curb escalating expenses, the healthcare industry has cooperated with managed care organizations and insurance companies to reduce costs, avoid waste and increase efficiency in delivering healthcare services.

(CPAN Amicus Curiae Brief, p. 13). In accord with these values, patients are discharged home from hospitals and other institutions whenever medically feasible (even if, as in this case, such feasibility requires expensive modifications to the patient's home), which removes from the health insurer and the health care industry the expense of providing "room and board"-type accommodations for the patient. Necessary medical care may still be provided by home visits and nursing/attendant care services (whether provided by willing family members or, failing that, employees of professional agencies), but the overhead of shelter, food, and all the other incidental expenses of daily living no longer are borne by the insurer.[3]

Instead, these expenses are borne by the patient himself and his family, since, while it may sound harsh, it is their moral and/or legal obligation. (*See*, CPAN Amicus Curiae Brief, p. 13 -- "physicians have also encouraged families to assume certain responsibilities for their injured family members"). Ideally, of course, the disabled victim himself has enough resources to bear his own living expenses.

When this is not so, and the family is unable or unwilling to assume responsibility, the question becomes whether it is the motoring public (the no-fault insurance scheme) or the taxpayers at large (general welfare) that must serve as the ultimate safety net. And the answer would be "no-fault insurance" *if* the act revealed that *all* economic losses resulting from motor

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[3] To be clear, any "attendant care" services provided by family members is covered and compensated by the insurer just as they would be if provided by a non-family, agency employee. The expenses *not* covered are those that are unrelated to the patient's injuries, such as food, shelter, clothing, toiletries, and other basic necessities that are "as necessary for an uninjured person as for an injured person." *Manley*, 142 Mich App at 454.

vehicle accidents are to be borne by the no-fault system. But this simply is not the case. *Belcher v Aetna Casualty and Surety Co*, 409 Mich 231, 240, 245; 293 NW2d 594 (1980); *Kitchen v State Farm Ins Co*, 202 Mich App 55, 58; 507 NW2d 781 (1993). Benefits to compensate for a victim's loss of the ability to earn a living last only three years beyond the accident date. MCL 500.3107(1)(b).

This point becomes clear when one considers the plight of an accident victim who is not so severely injured as Douglas Griffith, but nevertheless is permanently disabled form earning a living. Who bears the expense of his daily requirements of living? His own savings? His family? The food stamp program? Defendant respectfully submits that the posture of the catastrophically-injured accident victim who is able to be discharged home -- with the coverage of whatever special accommodations are reasonably necessary for the patient's accident-related care and treatment (i.e., home modifications, attendant care and the like) -- is no different.

CONCLUSION

This case examines whether any legal basis exists for imposing on the no-fault insurance system the responsibility for paying an accident victim's ordinary costs of living that are no different than those he would bear himself had there been no accident. Plaintiff (and the holding in *Reed*) would ask why an accident victim's so-called "room and board" benefits that the insurer bears for an accident victim who is hospitalized should suddenly be denied when he is able to return home.

The question, however, is more logically approached from the opposite direction. When it is clear that the no-fault insurance system is *not* responsible for even a disabled accident victim's food and housing costs when he resides at home, is there any reason such expenses

suddenly should be deemed "allowable" under §3107(1)(a) when his condition requires inpatient care? The answer is "yes." Without an inpatient "room" and institutionally-provided food service, the patient could *not* receive inpatient care. The expenses under those circumstances, therefore, are "allowable" as "reasonable charges incurred for reasonably necessary products, services and accommodations for an injured person's care, recovery or rehabilitation."

For all the foregoing reasons, Defendant-Appellant, STATE FARM MUTUAL AUTOMOBILE INSURANCE COMPANY, respectfully requests that this Honorable Court reverse the decision of the Court of Appeals and order the case remanded to the circuit court for entry of Judgment in Defendant's favor on Plaintiff's claim for reimbursement for food as an "allowable expense."

Respectfully submitted,

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September 17, 2004

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PROOF OF SERVICE

STATE OF MICHIGAN)
)ss
COUNTY OF WAYNE)

DANIEL S. SAYLOR, deposes and says that he is associated with the law firm of GARAN LUCOW MILLER, P.C., attorneys for Defendant-Appellant; and that on September 17, 2004, he caused two copies of the REPLY BRIEF ON BEHALF OF DEFENDANT-APPELLANT and this PROOF OF SERVICE to be served upon all counsel by enclosing same in well-sealed envelopes addressed to: GEORGE T. SINAS, ESQ./L. PAGE GRAVES, ESQ., Attorneys for Plaintiff-Appellee, 3380 Pine Tree Road, Lansing, Michigan 48911-4207; STEVEN G. SILVERMAN, ESQ., Attorney for Amicus Curiae ACIA, 615 Griswold, Ste. 1305, Detroit, Michigan 48226; and TERRY L. COCHRAN, ESQ., Attorney for Amicus Curiae CPAN, 15510 Farmington Road, Livonia, Michigan, 48154, with full legal postage pre-paid thereon and deposited in the United States mail.

DANIEL S. SAYLOR

Subscribed and sworn to before me
this 17th day of September, 2004.

LINDSAY C. DUGAN
Notary Public, Wayne County, Michigan
My Commission Expires: 11/26/07

Document: 544053.1